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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 298

JOHN J. HALKO, JR., *Petitioner*

v.

RAYMOND W. ANDERSON, *Respondent*

Appeal from the Order of the United States Court of Appeals for the Third Circuit refusing to grant Writ of Habeas Corpus

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Third Circuit

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To the United States Court of Appeals for the Third Circuit

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

(a) The denial of Petitioner's Petition for a Writ of Habeas Corpus was entered by Judge Caleb R. Layton of the United States District Court for the District of Delaware, and was entered on July 29, 1965 and is reported in 244 Fed. Supp. 696 (1965). A true

and correct copy of the opinion is appended hereto in accordance with the rules of your Honorable Court.

On appeal to the United States Court of Appeals for the Third Circuit, on May 5, 1966, that court affirmed the refusal action of the United States District Court for the District of Delaware. The said Order and Per Curiam Opinion of that court has not been officially reported in the official reports, a true and correct copy of the said opinion and order is appended hereto in accordance with the rules of your Honorable Court. On May 16, 1966, a Petition for Rehearing was filed by the Petitioner and on May 31, 1966, an order was entered by the United States Court of Appeals for the Third Circuit denying the Petition for Rehearing, which has not been officially reported and a true and correct copy of which is appended hereto in accordance with the rules of your Honorable Court.

(b) The basis for jurisdiction to be invoked in this case is the denial of due process to the Petitioner to receive a fair trial:

(1) As guaranteed by the 5th and 14th amendments of the Constitution of the United States.

(2) That the Petitioner was deprived of due process and of a fair trial in violation of the 4th and 6th amendments of the Constitution of the United States and of the pronouncements of your Honorable Court in *Sheppard* v. *Maxwell* (490 Oct. Term 1965, 34 U.S. Law Weekly 4451 (not officially reported).

(i) The date of the judgment sought to be reviewed, to wit, the refusal action of the United States Court

of Appeals for the Third Circuit in denying the Petition for Rehearing was entered May 31, 1966, and notice not received until June 2, 1966.

(ii) There was no order sought for an extension of time within which to file a Petition for a Writ of Certiorari.

(iii) The statutory provision believed to confer jurisdiction on your Honorable Court to review the judgment or order in question by Writ of Certiorari concerning a Writ of Habeas Corpus, is as set forth in 28 U.S.C.A. # 2243, # 2253, # 2254, to wit:

28 U.S.C.A. # 2241a:

(9) Writ of Habeas Corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The Order of a Circuit Judge shall be entered in the records of the district court of the district wherein the restraint complained is had.

28 U.S.C.A. # 2241, June 25, 1948, C. 646, 62 Stat. 964

28 U.S.C.A. Section 2253:

In a Habeas Corpus proceeding before a Circuit or District Judge, the final order shall be subject to review, on an appeal, by the Court of Appeals for the Circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to

test the validity of his detention pending removal proceedings.

An appeal may not be taken to the Court of Appeals from the final order in a Habeas Corpus proceeding, where the detention complained of arises out of process issued by a State Court, unless the Justice or Judge, who rendered the order, have a Circuit Justice or Judge issue a Certificate of Probable Cause; June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, Section 113, 63 Stat. 105; October 31, 1951, c. 655, Section 52, 65 Stat. 727.

May 24, 1949, C. 139, # 112, 63 Stat. 105

28 U.S.C.A. # 2254:

An application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of the state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. An applicant shall be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, as he has the right under the law of the state to raise by any available procedure, the question presented.

June 25, 1948 C. 646, 62 Stat. 967.

(c) The questions presented for review are as follows:

(i) Was the Petitioner deprived of a fair trial by reason of the prejudicial act of the state prosecutor in allowing a wine bottle to remain conspicuously in the presence of the jury during the trial, when the

prosecutor admitted he knew he could not introduce the bottle into evidence and therefore, in violation of the 5th and 14th amendments of the Constitution of the United States?

(ii) Was the Petitioner deprived of a fair trial by reason of prejudicial newspaper articles concerning his trial and previous trials, by failure of the trial court to admonish the jury concerning such newspaper, radio and television articles, where the jury was permitted to separate in violation of the 5th and 14th amendments of the Constitution of the United States and the most recent pronouncements of your Honorable Court in *Sheppard* v. *Maxwell, supra*?

(iii) Was the Petitioner deprived of his constitutional rights under the 4th, 5th, 6th and 14th amendments of the Constitution of the United States when the trial judge gathered material and introduced it into evidence at the hearing on the Petitioner's motion to suppress evidence, which was used against the Petitioner?

(iv) Was the Petitioner deprived of a fair trial in violation of the 5th and 14th amendments to the Constitution of the United States by reason of the failure of the trial court to permit Petitioner's counsel to use two accident reports, prepared by police officers, in cross-examining the police officers, particularly when the Petitioner's defense was alibi, and where there was only one alleged eyewitness?

(v) Was Petitioner deprived of his constitutional rights under the 4th, 5th, and 14th amendments to the Constitution of the United States by reason of certain evidence which was used to convict the Petitioner and which was seized without a search warrant when

the Petitioner was taken into custody, parked on private property owned by the Petitioner?

(vi) Was the Petitioner deprived of his constitutional rights under the 4th, 5th, 6th and 14th amendments to the Constitution of the United States because the Petitioner was detained for approximately eight hours before he was arrested or apprised of the charges against him?

(d) The principal Statute involved in this Petition concerning jurisdiction is 28 U.S.C.A. # 2243, # 2253, # 2254, set forth *supra*.

(e) The facts material to the consideration of the questions presented are as follows:

(i) This case arose by reason of the conviction of the Petitioner and the sentencing of the Superior Court of the State of Delaware in and for New Castle County No. 637 Cr. A. 1960, in which the Petitioner was sentenced to pay the costs of the prosecution, to pay a fine of One Thousand ($1,000.00) Dollars and that he be imprisoned for a period of eighteen (18) months, and in lieu of the payment of fine and costs an additional one year prison sentence commencing on the eighteenth day of December, 1965 and ending on the seventeenth day of December, 1966, be imposed. This sentence was imposed on a charge of operating a motor vehicle under the influence, and a second sentence on the charge of operating a motor vehicle during a period of revocation was entered to No. 639 Cr. A. 1960, in which the Petitioner was directed to pay the cost of prosecution and to be imprisoned for a period of three months commencing upon the expiration of the sentence imposed to No. 637 Cr. A. 1965. A true and

correct copy of both sentences are more particularly set forth in the record in this case.

(ii) The Petitioner was accused on Sunday, October 18, 1959, in the early morning, all times throughout being in dispute and of great importance to the defense of alibi to the Petitioner, of operating a motor vehicle under the influence and operating a motor vehicle during a period of revocation. The one alleged eyewitness, a Mr. William Forestieri, alleged that the Petitioner was the operator of a vehicle that had collided with him and was the sole alleged witness to the occurrence.

(iii) The city and state police were called to investigate and testified that the Petitioner was seated in his car with the headlights on, but no motor running. Despite the fact that the Petitioner made no effort to attempt to leave the area or to do any untoward act, and notwithstanding that there were four (4) police officers present at the same time, no search warrant was obtained, although any Justice of the Peace of the State of Delaware may issue a warrant. The Petitioner's car was entered and an illegal search and seizure made; and a wine bottle, driver's license and related matters were seized, upon which criminal charges were brought against the Petitioner.

(iv) On trial in the Superior Court of New Castle County of the State of Delaware, the Petitioner was convicted and on appeal to the Supreme Court of Delaware, conviction was reversed in *Halko* v. *State,* 175 Atlantic 2d 42. In the second trial held May 6, 1963, the trial was covered rather extensively by the Wilmington morning and evening papers, which newspaper articles are more particularly set forth in Peti-

tioner's Exhibit "# 57" in the record, (and also at page 261a of Appellant's Appendix) which were not only highly prejudicial by reason of references in the articles that the Petitioner had previously been convicted of the same charges at a prior trial, but that his prior conviction had been reversed on purely "technical grounds." The articles made frequent reference to this fact and of his prior conviction. The trial judge failed to instruct or admonish the jury concerning these newspaper articles, notwithstanding, that the jury was permitted to separate during the trial, and notwithstanding, that the repeated articles violated the very spirit of the pronouncement of your Honorable Court, *Sheppard* v. *Maxwell supra.* As a matter of fact, after the trial of the case, the trial judge sent a memorandum to the members of the court, as set forth in Exhibit # 75 of the record in this case, (also printed in Appellant's Appendix at 273a) in which he stated his concern pertaining to the articles and the fact that the jury should re-assemble so that inquiry could be made and to determine the influence of the newspaper articles upon the jurors. However, the other members of the court refused to allow this to be done and to make it a part of the record.

(v) At the trial of the case, the Deputy Attorney General, Mr. Stabler, permitted an empty wine bottle to be conspicuously in full view of the jury although he knew and admitted that he knew that he could not introduce the bottle into evidence, as appears at 272 and 273, of the official trial record in this case. After a day and a half approximately, the trial judge directed the removal of the bottle after the prejudicial effect had taken root in full view of the jury. In the course of the trial the Petitioner attempted to

cross-examine police officers concerning two accident reports, which had been prepared by the police officers and which cross-examination went directly to the time elements involved in support of the Petitioner's defense of alibi and went to the heart of the case to attack the credibility of the state witnesses. This right of cross-examination was denied by the trial court and the Petitioner was subsequently convicted.

(vi) Prior to the second trial, the Petitioner had filed a motion to suppress evidence, which motion related to the driver's license which had been seized and was the basis for a charge to be brought against him aforesaid, together with the return of a wine bottle, parking ticket and related matters. During the hearing before the trial judge, Trial Judge Lynch, without notice to defense counsel proceeded to gather certain evidence against the Petitioner on his own, and at the hearing upon the motion, assisted the Attorney General, who had asked for help from the court to place certain records into evidence against the Petitioner. These actions of the trial judge are more particularly set forth in 164a-166a of Appellant's Appendix printed for the United States Court of Appeals and transmitted to your Honorable Court. The trial court was further requested to suppress the articles seized from the Petitioner aforesaid mentioned and to declare the actions of the Delaware police to be unlawful search and seizure by reason of the fact that no search warrant had been obtained, notwithstanding that there was absolutely no reason for the failure to obtain such a warrant and because your Honorable Court had ruled as of the time of this case, in *Mapp* v. *Ohio*, 369 U.S. 643 (1961), that federal standards were to be employed and not state standards to determine what is,

or is not, a valid search and seizure. The Petitioner had also been held for over five (5) hours without a charge being brought against him, without being arrested, and detained in a jail cell. The trial court refused the Petitioner's motion. On appeal to the Supreme Court of Delaware, conviction was affirmed.

(vii) A Petition for a Writ of Habeas Corpus was directed to the United States District Court for the District of Delaware. After a hearing was held, Judge Layton on July 29, 1965 denied the Writ to the Petitioner. Appeal was duly taken to the United States Court of Appeals for the Third Circuit. The action of the United States District Court was affirmed. A Petition for Rehearing was filed May 16, 1966 to the United States Court of Appeals pointing out that the decision of Judge Layton of the United States District Court for the District of Delaware was directly in conflict with a decision of the United States District Court for the Eastern District of Pennsylvania, to wit: *United States, ex rel Manduchi* v. *Tracey,* 233 F. Supp. 423 (1964), which decision upheld the use of federal standards concerning search and seizure whereas, Judge Layton up-held for all intent, the use of state standards, which is contrary to the ruling of your Honorable Court in *Mapp* v. *Ohio supra.* The Petitioner has filed his Petition for Writ of Certiorari and the matter is now before your Honorable Court for disposition.

(f) No review of a judgment of a state court is sought in this Petition.

(g) A review of the judgment or order of the United States Court of Appeals for the Third Circuit is sought by reason of the denial of the Petition for a

Writ of Habeas Corpus. The basis for federal jurisdiction in the court of first instance, in addition to the provisions of the Habeas Corpus Act are the denial of due process as set forth in the 4th, 5th, 6th and 14th amendments of the Constitution of the United States, as set forth supra. A Certificate of Probable Cause was issued from the United States District Court for the District of Delaware to the United States Court of Appeal.

(h) The Petitioner believes that a Writ of Habeas Corpus should issue by reason of the following:

(i) The position of the petitioner seems to be amply supported by a well-reasoned opinion of the Superior Court of the Commonwealth of Pennsylvania, as set forth in *Commonwealth* v. *Miller,* 203 Pa. Superior Court 511 (1964) and 201 A. 2d 256 (1964). In that case the defendant had been charged with robbery and related offenses. In the trial of the case there were two pieces of twine or rope that allegedly had reference to the defendants in that case to show their culpability. The District Attorney permitted the pieces of twine or rope to remain in the view of the jury and knew that it would have a strong circumstance against the defendants. It was then ascertained that the prosecuting attorney knew before the case was submitted to the jury that the exhibits could not be used in evidence, and withheld this information from the trial judge and jury.

In the case at hand Mr. Stabler, who had the benefit of a previous trial and a hearing to suppress evidence before the second trial, admitted that he knew that he could not link or introduce the empty wine bottle into evidence. The Superior Court of Pennsylvania

held that to withhold this information from the judge and the jury *and* in allowing the jury to infer a fact which was contrary to the known and established actual facts, the Commonwealth suppressed evidence and violated the right of the defendants to receive a fair and impartial trial for, as the Court stated at page 519 of its opinion, that although the defendants may be completely guilty, the constitution requires that their guilt or innocence be established only after a trial that is fair and just under the law and the constitution.

Mr. Stabler admitted that he could not establish a claim of evidence for this bottle and knew he could not introduce it into evidence. What, then, was the purpose of permitting the wine bottle to be in the conspicuous view of the jury! It has been held that:

> "A conscious attempt by counsel to get before a jury matter which he knows to be incompetent evidence with a design and purpose of bringing such evidence to the attention of the jury and influencing them in his favor will constitute misconduct. Evidence which serves only to prejudice the minds of the jury is properly excluded. The erroneous admission of evidence which tends to arouse the passions of the jury, or which may result in a miscarriage of justice or the violation of a constitutional right, ordinarily will be held to be reversible error particularly in criminal cases." 53 *Am. Jur., Trial,* Section 98, page 88.

> "Other instances of misconduct are the willful bringing in or attempting to bring in of irrelevant, previously excluded, or incompetent evidence for the purpose of prejudicing the opposing party . . ." 53 *Am. Jur., Trial,* Section 459, pages 360-361.

(ii) It was further established in Judge Layton's opinion at pages 350a, 351a, that after the petitioner

had been convicted and he learned of the newspaper articles, Judge Lynch went into conference with his fellow judges concerning what corrective steps, if any, should be taken because he admittedly was disturbed by this aspect of the case. Due to the fact that the trial judge decided not to place upon the record an interrogation of the jurors as to the effect of the newspaper articles, it has been indicated that there is no evidence of prejudice on the record and that the petitioner would be speculating at the most; but this is rather strange logic when the record is clear and acknowledged by Judge Layton that the then counsellor for the petitioner did attempt to have the record clarified concerning this vital point and was denied the opportunity to do so. We do not believe that it is either fair or contemplated under the Fifth and Fourteenth Amendments to the Constitution of the United States that this constitutes due process or a fair trial.

It has been further held, 23 *Ac. A. S., Criminal Law,* Section 1361, page 960, that where the jurors are permitted to separate, they should be admonished by the Court not to read published accounts of the course of the trial. It has further been held that the conduct and deliberation of the jurors should be free from all aspects of extraneous or improper influences. It is improper for them to discuss the case or to receive any information about it, except in open court and in the manner provided by law; and such misconduct on their part which is *or may be,* prejudicial to the accused, will vitiate a conviction.

Your Honorable Court in *Sheppard* v. *Maxwell,* entered to No. 490, October Term, 1965, and reported in Harrisburg at 34, The United States Law Weekly, page 4451, in which your Honorable Court in affirming

the grant of a Writ of Habeas Corpus held inter alia, that the jurors were allowed to go their separate ways outside of the court room without ADEQUATE directions not to read or listen to any thing concerning the case, other than the actual evidence. In the Sheppard case the Judge did SUGGEST to the jury that they should not read the newspaper accounts or listen to the radio and television reports, which SUGGESTION WAS NOT MADE IN OUR CASE, and clearly in violation of the clear meaning of the decision of your Honorable Court supra. Further, your Honorable Court referred to the very matter complained of by counsel for the Petitioner to the United States Court of Appeals in which that court was specifically advised that a number of the newspaper articles contained references to matters that were clearly inadmissible and notwithstanding, were disseminated as if they were facts. The decision of *Marshall* v. *United States,* 360 U.S. 310 (1959) was also cited to the United States Court of Appeals to the effect that the Wilmington Morning News and the Wilmington Evening Journal referred to the prior convictions of the Petitioner and such information could not be introduced into evidence, together with the other prejudicial remarks that are self-evident from the newspaper articles set forth in Exhibit # 57, within mentioned.

Moreover, your Honorable Court, in *Estes* v. *Texas,* 381 U.S. 532 (1965), has held that a procedure or process which indicates with such a probability that prejudice will result, is a practice or procedure that is lacking in due process. Further, as your Honorable Court indicated in citing, *Commonwealth* v. *Chrehan,* 345 Mass. 609, that where a judge refuses the defense

counsel's request, that the jury be asked if they have read the comments and articles about the case, a court can determine in such a case on appeal, that prejudice did occur and that the burden of an essential unfairness can in fact be established. There is no question in the record in this case that the defense counsel, requested the trial judge to recall the jury to determine the effect of the prejudicial newspaper articles and that THE TRIAL JUDGE DIRECTED COUNSEL to make a part of the record, all newspaper stories about the case! (See Exhibit # 75 of the official record, which exhibit is also printed at 273a of Appellant's Appendix printed in the United States Court of Appeals for the Third Circuit and transmitted with this Petition.)

(iii) At pages 148a-149a and the other pages to be referred to, having been printed in the Appellant's Appendix in the United States Court of Appeals for the Third Circuit, Judge Lynch acknowledged that on his own he went to the Recorder of Deeds' office and made his own search of certain dimensions, that he contacted a Mr. Tomasetti, the Division Engineer of the State Highway Department of Delaware, that he discussed certain matters with him, and that the Court accepted certain information from Mr. Tomasetti, for which the Petitioner never had a right to examine or cross-examine this individual.

The Court further indicated at page 149a, that the Court then determined that a Mr. Miller might be beneficial to whatever Judge Lynch was seeking, and he, Judge Lynch, directed Mr. Miller to come to court to testify.

Further, at pages 163a-164a, and 165a-167a, the inherent danger and prejudice of such conduct on the

part of the trial judge became manifest when the former counsel of the Petitioner determined that certain deed references directed to be entered into the evidence by the Judge, was in error and that such action was objected to as not proper.

The trial Judge Lynch acknowledged, at page 166a, that "I did this myself". He advanced the reason that he was trying to get the case done with dispatch and by reason of the same, this was the only reason for his action.

When the trial judge indicated that he wished to go to the scene of the occurrence, his active participation to assist the prosecution may be further ascertained from the following:

At page 156a of the motion to suppress evidence before Judge Lynch, a Mr. Wetherall admitted that the State of Delaware did not own Brookside Drive. The next witness who then testified at pages 164a-165a, a Mr. Anthony Buda, whose interrogation was carried on exclusively by the Court, Mr. Buda being duly sworn according to law was examined and testified as follows:

> "Mr. Stabler, the Deputy Attorney General, stated, 'Your Honor, I will be forced to admit that I would welcome suggestions from the Court as to how to get these in (indicating).'
>
> By the Court:
>
> Q. Mr. Buda, are these records—part of the records?
>
> A. They are part of the records as they are and do appear in the Recorder of Deeds' office."

Petitioner believes, therefore, that the activities of the trial judge went above and beyond the duty and the

function of the trial judge to maintain a fair and impartial attitude towards the conduct of a trial between the parties. Upon this trial judge rested the responsibility of striving for an atmosphere of impartiality (53 *Am. Jur., Trial*, Section 75, page 74). In criminal cases the trial judge should use the greatest care to avoid prejudicing the cause of either side by reason of his language or conduct.

We respectfully submit that the overt actions of the trial judge were contrary to the requirements of impartiality and fairness so as to guarantee a fair trial within the meaning of the Sixth and Fourteenth Amendments to the Constitution of the United States, and also justifies the granting of a Writ of Habeas Corpus.

(iv) The occurrence referred to, took place in the trial before Judge Lynch beginning with the reference to pages 259a-260a of the Appellant's Appendix printed in the United States Court of Appeals for the Third Circuit, which has been transmitted along with the record to your Honorable Court, as follows:

The Court ruled that two accident reports dealing with time elements concerning the Petitioner's case, as to when the police were supposed to have received reports of the incident and the events that transpired, could not be used to show that these officers testified at the second trial in contradiction to what they had testified to at the first trial. This also had a direct bearing upon their credibility and of course by necessity, upon the credibility of the other State's witnesses involved.

When this point was considered by the United States District Court for the District of Delaware, the following exchange was conducted by Judge Layton of that

Court with the Deputy Attorney General, as follows; on pages 335a-337a of Appellant's Appendix aforesaid, to wit:

"The Court: No, we can't consider that. This is the second trial that we are to examine into now. And you will concede that Forestieri's is the only testimony in the trial that we are examining into now which could possibly prove that this Defendant was operating this car on the highway.

Miss Ferrell: Yes, your Honor.

The Court: All right. Then why isn't this Defendant permitted to assail the credibility of Forestieri to the full extent that he is able by showing divergencies in times, both given by Forestieri and the police officers, etc., which might, if the jury believed the cross-examination, throw substantial doubt in the minds of the jury that Forestieri ever did see this man on the highway?

Miss Ferrell: Your Honor, as far as I can follow what times the Petitioner is trying to point out —and it is not quite clear exactly what the times are—they seem wholly immaterial.

The Court: Well now, let me ask you this question. This is what the Supreme Court of Delaware found, and it worries me. Maybe I am not getting at this properly. If Forestieri came on the stand and said that he had seen the Defendant driving this automobile at 2:30, and then it was shown that in another trial he said that he has seen this Defendant driving an automobile, this automobile, at 11:30, two hours before, and again on the deposition, that he hadn't seen this car until 3:30, isn't the jury entitled to have that cross-examination, that evidence, before it, in order to decide whether he should be believed at all, as to whether he saw the Defendant driving the car? It goes to credibility. Because the Defendant, you see, in his alibi, is denying this. And certainly it seems to

me the Defendant is entitled to show that the prosecuting witness' credibility is so doubtful that they might not believe him; that they might believe the Defendant's alibi.

So why wasn't the Defendant prejudiced, here, by not being able to look at all these times given in these various reports; which I haven't seen, understand; I am just being told that there are a lot of divergencies in times given by Forestieri and the police, and so forth.

Miss Ferrell: Your Honor, in the alternative, I would argue that under the decision in the Davis case, this information might be considered part of the information that is privileged.

As I understand the Court's opinion in the Davis case—

The Court: You might as well save the Court's opinion in the Supreme Court of Delaware, because they sustained the Davis case.

Miss Ferrell: Yes, the opinion in Skinner v. Herzog followed the Davis case.

The Court: The only reason the Supreme Court of Delaware said this point made by Mr. Knecht is of no moment is because even assuming these police reports had been entered into evidence and the opportunity to cross-examine on them had been given, the result was immaterial. And the immateriality of the thing is what I am worried about. It is the point of immateriality that bothers me.

We further contend that the denial of this right of cross-examination falls within the purview of *United States* v. *Cardillo,* 316 F. 2d 606 (2d Cir. 1963).

Therefore, in view of these many discrepancies in time and the question as to whether or not the police

reports referred to two or more vehicles instead of one, it would appear that it was very important to the Petitioner to be able to employ these reports. It is important to note that the Petitioner did not intend or request to place the reports into evidence. The sole purpose was to cross-examine the officers with regard to the time references on the reports concerning their time of arrival, departure and related matters. Section 318 of the Delaware Act prohibits the use of reports in evidence only. However, it has been held that a witness may be refreshed concerning his recollection from any written entry or memorandum. 3 *Charleston, Criminal Evidence,* Section 853, page 229. It is not necessary that the memorandum be made by the witness. 2 *Underhill's Criminal Evidence,* 5th Ed., Section 449, page 122.

(v) The Court's attention is called to the fact that Judge Layton proceeded on the premise that the second trial of the Petitioner was not to be governed by *Mapp* v. *Ohio,* 369 U.S. 643 (1961), and that State standards were to be employed to determine whether or not there was a valid arrest and whether or not there was an unlawful search and seizure. We submit most vehemently that learned Judge Layton was completely in error because the second trial of the Petitioner was held on May 6, 1963, which was almost two years after the *Mapp* case and, since it was a new trial, the Petitioner was entitled to have his case, as well as the motion to suppress evidence, held May 15, 1962, to be determined by Federal standards rather than State standards. We think the case of *United States ex rel. Manduchi* v. *Tracey,* 233 F. Supp. 423, 1964, clearly sets forth the controlling case law that such searches and seizures are governed and protected by

the Fourteenth Amendment to the Constitution of the United States. The decisions were clear that Federal standards and not State standards are to apply.

A clear reading of the testimony and the record in this case show that there was no reason whatsoever for the failure of the police to first obtain a search warrant. There was nothing, according to the testimony of the States witnesses, to indicate that the Petitioner gave any indication of trying to escape or to leave the scene. The witnesses clearly establish that there were no less than four police officers around the Petitioner's car and two officers waited over fifteen minutes for the two State Police Officers to arrive. If there is to be any meaning to the pronouncements of our Federal Courts that Federal standards are to apply, then this surely is the case!

In this connection, the United States Court of Appeals in the Petition for Rehearing was expressly requested to rule whether or not, *United States, ex rel. Manduchi* v. *Tracey, supra,* was to apply to search and seizure or whether or not the ruling of Judge Layton, over-ruled that decision. Unfortunately, the United States Court of Appeals made no answer to this very important question.

In this connection although the Petitioner, who was the president and sole stockholder of H and S Manufacturing Company, a Delaware corporation that held title to the private property, there is no question that the Petitioner has a right to object to the unreasonable search and seizure effected upon him, as well as the automobile owned by him personally. (See *United States* v. *Neffers,* 342 U.S. 48; *Jones* v. *United States,* 362 U.S. 25, and *State* v. *Carter,* 89 A. 2d 131 (1952).)

The State trial court had ruled that the Petitioner's car was not parked on the property of H and S Manufacturing Company but was parked in "open space", but the Supreme Court of the United States in *Rios* v. *United States*, 364 U.S. 253 (1960), held that an occupied taxicab is not to be compared to an open field or open space.

Also, we respectfully submit that the Supreme Court of Delaware and learned Judge Layton ignored the case of *Carol* v. *United States*, 267 U.S. 132 (1924), which dealt directly with the search of automobiles. In *Rent* v. *United States*, 209 F. 2d 893, 5th Circuit (1954), the Court set aside a conviction based on evidence obtained in the search of an automobile without a warrant *after an arrest* saying, at page 899, "The officer had ample opportunity to apply for a search warrant and, in our opinion, a search of the automobile without a warrant was not justified."

As was noted in the Manduchi case, supra, what the officers discover and determine subsequent to the unlawful search and seizure does not cure the illegality and the failure to have obtained a search warrant prior thereto. This same expression was set forth in *United States* v. *Enderlein*, Criminal Action No. 1597, opinion by Judge Steel of the United States District Court for the District of Delaware, in which the Court stated, "but because reasonable cause is indispensible to a search without a warrant or prior to arrest, it does not follow that every search is reasonable if probable cause exists. Its reasonableness may well require the consideration of other factors, such as the opportunity and practicality of the officers obtaining a search warrant prior to making the arrest."

In the State of Delaware any Justice of the Peace can issue a search warrant. There is absolutely no justification for the failure of the State to obtain same. They seized the controversial alleged wine bottle, the registration license of the Petitioner, a parking ticket from the Wilmington Parking Authority as a result of the unlawful search and seizure, which evidence was not suppressed by the Court. As a matter of fact, the evidence clearly established that the Petitioner's car was, for all intents and purposes, substantially on private property. The constitutional safeguard, as set forth in *Mapp* v. *Ohio, supra,* to have meaning must be upheld, and the only way that it can have true meaning is for the pronouncement of your Honorable Court to declare the search and seizure to be unlawful and in violation of the Petitioner's constitutional rights.

(vi) The learned Judge Layton and the Supreme Court of Delaware in the Petitioner's case, *Halko* v. *State,* 175 A.2d 42 (1962), stated that in their opinion, detention of the Petitioner was proper as a lawful arrest. The Delaware Supreme Court felt that this was an arrest on view. Assuming, arguendo, that there is a basis for using State interpretation, how could the detention be an arrest even by State law. 11 Delaware Code, Section 1902(c) expressly states as follows: "The total period of detention provided for by this action shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime."

No charge was made at the scene (N.T. 95, 96, 87 in the second trial before Judge Lynch.)

Further, although the Supreme Court of Delaware held that the Petitioner had been arrested on view, the police officers state that they made no arrest (127a, 128a of the motion to suppress evidence before Judge Lynch). Also, if the Petitioner was lawfully arrested by the police, why did the police send Mr. Forestieri to sign a warrant at the magistrate's office at 5:00 a.m. (N.T. 95 of the second trial before Judge Lynch), and why did Trooper Clair say that the police were waiting for this to be done (128a-129a of the hearing to suppress evidence before Judge Lynch).

(i) Submitted herewith are true and correct copies of all opinions and orders rendered relative to the case at hand.

(j) A review of the judgment of the United States Court of Appeals for the Third Circuit affirming the United States District Court for the District of Delaware in refusing a Writ of Habeas Corpus is sought by this petition.

Respectfully submitted,

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